No. 3750

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 9

GRECO CANNING COMPANY
(a corporation),

Plaintiff in Error,

vs.

P. PASTENE & COMPANY, Incorporated
(a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM THOMAS,
LOUIS S. BEEDY,
JAMES LANAGAN,
THOMAS, BEEDY & LANAGAN,
Attorneys for Defendant in Error.

No. 3750

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GRECO CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

P. PASTENE & COMPANY, Incorporated
(a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This is an action on a contract dated April 28, 1916, by which plaintiff in error agreed to sell and deliver f. o. b. cars San Francisco three thousand cases of Salsa de Pomidoro, packed two hundred tins to the case, for $3.50 per hundred tins, or $7.00 per case. It made delivery of only six hundred and sixty-five cases, leaving a balance undelivered of two thousand, three hundred and thirty-five cases.

It was stipulated that the market price of the goods at the time and place of delivery was $10.00 a case. It follows that the judgment against plain-

tiff in error is right, unless it was for some reason excused from performing the contract.

The contract contained the following provision:

> "In case of short pack seller agrees to make pro rate delivery only. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances beyond its control, such obligations shall at once terminate and cease."

In its answer the Greco Company offers two reasons for nondelivery:

1st. That there was a short pack within the meaning of the contract; and

2nd. That it was prevented from delivery by a cause beyond its control, namely, the failure of the tomato crop in the year 1916.

SHORT PACK.

The Greco Company's contention seems to be that it had a short pack because of the failure of the tomato crop, and also because its paste-making machinery failed to work. We shall first consider the question as to whether or not there was a failure of the tomato crop in 1916. There is some conflict in the testimony, although the general effect of the evidence seemed to indicate that the damage done by the rains and frost was not very serious. The schedule introduced by the plaintiff, showing the average production of tomatoes in various parts of the state in the year 1916 gave the Santa Clara

Valley 9.09 tons to the acre. Mr. Milton M. Berne, a broker, who testified on behalf of the defendant, stated that 9.09 tons to the acre in Santa Clara Valley "would be a fair average production" (Transcript pages 134-5). The evidence given by the two tomato growers was anything but satisfactory. Mr. W. E. Greer cultivated six acres of tomatoes in 1916 (Transcript page 159). He got a little less than four tons to the acre (Transcript page 159). Yet he said, on cross-examination (Transcript page 162), that Mr. Withers, on the Almaden Road, one of his neighbors, delivered to the California Packing Corporation seven tons to the acre. Perhaps the reason why Mr. Greer only got three and one-half to four tons may be found in Mr. Greco's testimony (Transcript page 40). In answer to a question as to the effect of rain on the tomato crop, he said:

> "You would not get two fields that were alike, Mr. McNab, because one field, if properly taken care of, regardless of rain and weather conditions, will produce maybe twenty-five tons of tomatoes to an acre; another field in the same valley, and handled by some other man, not properly cultivated, will produce maybe only three tons to the acre."

Mr. J. L. Mosher got only one hundred tons from his twenty acres. He was not under contract to deliver his tomatoes to anybody, and one reason why he got such a small yield may be found in his testimony on cross-examination (Transcript page 165).

"Q. Did you have all the help you needed with your tomatoes?

"A. I don't think we did. I think we were a little short of help. A little short, but not so as to be crippled at all."

Mr. H. Rigg, who ran the paste line of machinery for the Greco Company, on direct examination testified as follows (Transcript page 137):

"There was no time that we did not stop altogether. There were times when we ran along short on account of green tomatoes coming in and we could not use them for making sauce. I think that occurred twice. That was right after the rain began. The rains began the 2d of November. There was rain the latter part of the month of October once in a while. There would be a little shower, but it did not amount to much. The serious rains commenced the 2nd of November. There did not any green tomatoes come in but stopped us from packing for about 3 days because we could not get into the fields to haul them out. On November 18th we did not run very much through the vacuum pans on account of green tomatoes. I see no instance before that. That is all I see here."

Again, on page 145, we find the following:

"Very frequently during the season of 1916, when I was in the (123-90) employ of the Greco Canning Company, I had an opportunity of observing the tomatoes that I was putting through this paste machine. There was no time that I can recall when there was a shortage of tomatoes, outside the latter part of the season, in November, those three days that I testified to, and the latter part of the season. We were slowed up at least on two days on account of green tomatoes coming in, and that

> was due to the fact that it took a long time to sort them, because there were so many green ones. With the exception of that we had plenty of tomatoes."

On cross-examination (Transcript page 147) Mr. Rigg said:

> "During November we did not shut down because we did not have the tomatoes. We shut down the night shift because the night man could not seem to make a success of running it."

Mr. Leal Davis, consulting engineer of the Greco Canning Company, called as a witness for the defendant, said, on cross-examination:

> "I was there every day and saw this part of the plant in operation. I do not think I ever saw the paste line shut down for lack of tomatoes."

Mr. Charles H. Bentley, General Sales Manager of the California Packing Corporation, testified (Transcript page 199): That in the year 1916 the California Packing Corporation made full delivery on its sales of tomatoes and tomato products in 1916 from the pack of its Santa Clara plant known as the Central California Canneries, and a one hundred per cent. delivery on all its other plants. Answering a question by the court, he said (Transcript page 203):

> "As to the failure of the crop in 1916, through weather conditions, it was not serious. I said from 15 to 20%."

In view of all the evidence on this point, it seems to us that Mr. Bentley was probably right, and that

in the year 1916 there was not really a shortage of tomatoes, serious enough to excuse the Greco Company from making a full delivery against his sales of Salsa De Pomidoro. Judge Van Fleet allowed an abatement of 20%.

In addition to a failure to sustain the burden of proof of crop failure, the Greco Company did not make the necessary effort to get tomatoes elsewhere. Mr. Greco testified (Transcript page 110) that he found out that his acreage was insufficient, due to rain and frost, right at the beginning—say some time in October. He sent a buyer to Manteca and he himself went to San Francisco (Transcript pages 110 and 111). He also tried to get tomatoes in the Santa Clara Valley. On page 117 of the Transcript we find the following testimony on cross-examination:

> "Besides Manteca and San Francisco I endeavored to get tomatoes in the season of 1916 in our immediate vicinity.
>
> "Q. In your immediate vicinity. Anywhere else? A. No, sir."

Although the matter is so well known that the court could take judicial notice of it, Mr. Berne, one of Greco's witnesses, testified (page 135): That tomatoes were grown in Alameda County, San Joaquin County, Sacramento County, many of the southern counties around Los Angeles, and Sonoma County. Now, there was nothing in the contract which provided that the Salsa De Pomidoro was to be made from tomatoes produced at any particular

place, and under the circumstances it was the Greco Company's duty to use every reasonable effort to get the tomatoes in any available market.

This precise question came before the Supreme Court of Wisconsin, in the case of

Newell et al. v. New Holstein Canning Co.,
97 N. W. 487.

There the defendant sold to plaintiff certain cases of canned tomatoes and the contract provided that if by the destruction of the defendant's cannery by fire, or on account of strikes, "or from any other cause over which" he had no control, he was prevented from performing the contract, he should not be liable for any damages for such failure. His tomato crop was destroyed by frost. He thereupon made efforts at two markets,—one eleven miles and the other forty-six miles from his cannery,—to procure tomatoes, but failed. The court held him liable, and the case is so precisely on all fours with our case that we quote at length from the decision. The court said, at page 488:

> "One of the defenses to excuse delivery of the tomatoes specified in the contract was that appellant was prevented from performance owing to unusual frosts in the month of September, whereby their fruit and the crop in the immediate vicinity and the eastern part of the state was destroyed; and on that account it had raised no tomatoes, nor could it procure any in the vicinity of the factory to comply with this undertaking. Does this present a state of facts which relieves the company from performance of the contract? It is claimed the provision

that 'if by the destruction of the cannery by fire, or if on account of strikes, or from any other cause over which the seller has no control, he is prevented from performing this contact, he shall not be liable for any damages for such failure', covers and includes the destruction of the tomato crop by frost, as shown by the evidence, and excuses appellant from full performance of the agreement. There is no allusion in the contract to any particular source from which these tomatoes were to be taken except that they should be of the 1901 pack of appellant's cannery. Reading the material provision in the light of the facts and circumstances under which it was made, it seems a reasonable and natural conclusion that the parties did not intend that appellant was undertaking to sell and deliver tomatoes to be grown upon a particular field, or in the immediate neighborhood of the cannery. Had the sale been to deliver a crop grown on appellant's field, or in the neighborhood of the cannery, then the destruction by frost of the crop so specified might be held to be an excuse for the nonperformance of the undertaking, under the rule that the promise to deliver a specific article depended on the assumed existence of it at the time of performance, and that it was destroyed without his fault, rendering performance impossible. Appellant, however, was not restricted under the contract to such field or neighborhood to produce tomatoes to fill the contract. It had the right to go into the open market and purchase tomatoes of the kind and quality specified in the agreement, pack them at its cannery, and deliver them to respondent under the terms of the contract. It therefore was its duty to make all reasonable effort to secure the necessary fruit, and pack it at its cannery, to enable it to comply with its promise. The question arises, does the evidence tend to show that appellant

took the necessary steps to comply with this obligation? It is undisputed that the tomato crop on its field and in the immediate vicinity of the cannery was destroyed by frost on the 18th or 19th of September. It is testified that this frost extended over the eastern portion of the state. The material part of the evidence on this subject is the testimony of the secretary of the company. He states that the efforts made to secure tomatoes for packing at appellant's cannery were limited to two inquiries in the market—one at St. Nazianz, 11 miles from the cannery, and the other at Appleton, 46 miles from the factory. No other efforts were made to procure the fruit in other portions of adjoining territory or in the open market. For aught that the evidence discloses, appellant might have secured all the tomatoes needed in the market within a reasonable distance from the factory, making it feasible and practicable to buy the fruit and transport it to the cannery for the purpose of this undertaking. Under this state of facts and circumstances, no grounds were established constituting a legal excuse relieving appellant from performing its obligations under the agreement, and respondents had a right to insist on performance."

According to this decision, it was certainly the Greco Company's duty to make efforts in other places than Manteca and San Francisco. There is no showing in the record that it could not have gotten its tomatoes in Alameda County, or in the Sonoma or San Joaquin valleys, or perhaps from Los Angeles.

A very weak attempt is made on pages 8 and following of the opening brief to distinguish the case of *Newell et al. v. New Holstein Canning Co.,* 97

N. W. 487. Mr. Greco did testify that it was his custom to buy tomatoes in the immediate vicinity of his plant, but of course this custom could not bind Pastene & Co. Under the doctrine of the Newell case he was bound at least to try Alameda, San Joaquin, Sacramento and Sonoma counties. The doctrine of the Newell case fits this case precisely. When the defendant found out *right at the first of the season* that the crop in the Santa Clara Valley was going to be short, it was bound to make the attempt in good faith to find the tomatoes within a reasonable distance of the cannery.

In our opinion, however, there is a far more serious reason why the plaintiff in error in this case cannot rely upon a short crop as a reason for a short pack. Mr. Greco failed to produce data which would enable the court to determine what *the relation was between the acreage that he had contracted for and the amount of tomato products that he had sold against that acreage.* When he was asked how many cases of solid pack he contracted to sell from the 1916 pack, he answered: "I have no recollection" (Transcript page 116). After he had stated that he had the contracts, the court said:

> "Yes, produce those contracts, not only for that, but for your acreage, too."

Mr. Greco testified that he made a search for the contracts for delivery of tomatoes from the 1916 acreage, but that he could not find them, and thought they were destroyed (Transcript page 183). This

leaves us in a position of not being able to determine whether Mr. Greco had oversold his acreage or not. He testified that to the best of his recollection he had contracted for from 500 to 550 acres and that he expected to get 5,500 tons of tomatoes from that acreage. *But since we do not know whether he sold 5,500 tons or 1,000 tons, or 20,000 tons, we cannot tell whether any damage to the crop made any difference in his ability to deliver or not.* He has simply failed to produce evidence sufficient to sustain the burden of proof that damage to the tomato crop of 1916 prevented him from delivering one hundred per cent. of the tomatoes that he had contracted to sell. We think that this disposes of the whole question of short crop, *regardless of whether or not the crop was damaged.* In the absence of any evidence of what sales and deliveries he made, for instance of solid pack tomatoes, *for which product the same tomatoes were used as for Salsa de Pomidoro* (see Mr. Greco's testimony, Transcript page 93), the question as to whether the crop of 1916 was damaged by frost or rain really becomes immaterial. Mr. Greco said (Transcript page 119):

> "I do not remember what percentage of deliveries of solid pack we made in 1916. The book I referred to before will show the actual deliveries. I do not remember whether we were able to fulfill our contracts or not. To be frank, I do not remember whether they were 50% or 100%, and I do not remember about the tomato sauce, whether 100% for them or not."

He gave the court no basis of calculation.

A great deal of testimony was introduced to the effect that Mr. Greco had a great deal of trouble with the paste-making machinery—the so-called "paste line", and particularly with the vacuum apparatus. This brings us to the second branch of the short pack defense, and the question that we have to decide is, whether a failure of the machinery, under the circumstances of this case, would be an excuse for a short pack, and, therefore, a valid reason for making a pro rata delivery. It seems that this vacuum pan process was in use at Naples, Italy, but had not been used in this country. The Greco Company's letter of January 5, 1916 (Transcript pages 61-62), stated that it contemplated packing about 60,000 cases of Naples Tomato Sauce, which was, of course, the Salsa de Pomidoro, and went on to say:

> "As we are Italian, and know what the Italian people must have, *and being very familiar with the method of manufacturing this article,* you can rest assured that it will be the equal of that imported from Italy."

It seems that Mr. Greco read a report by the Department of Agriculture of the United States Government, that he studied it up, and that then he and George Krenz, a coppersmith, got their heads together and devised the vacuum pan apparatus (Transcript pages 105, 109 and 118). Krenz then installed it and sent a man to run it. After that, Rigg was put in charge of the vacuum pans and

operated them until November 28th. The trouble with the vacuum pans seemed to be more or less continuous, and the Greco Company finally learned, that is to say, experience taught them, that the tubes were too small (Transcript page 150). This was afterwards remedied and the next season the vacuum pans worked well.

The court will undoubtedly notice that there is no testimony even tending to show that any experiment was made with this machinery before the defendant began to sell its product.

A number of experts testified as to whether or not a failure of machinery would be included in the term "short pack". The defendant's witness Sussman testified as follows (Transcript page 180):

> "Q. Just describe to the court in a general way what that is intended to include, as you understand it in the trade?
>
> "A. The trade understands that the canner, in selling a certain amount of goods on a future-delivery contract, is selling that quantity of goods in good faith, and expects at the time to deliver the full quantity that he sells; it is thoroughly understood by the trade, however, that if he does everything in good faith that he can to make full delivery, *if he is prevented by circumstances beyond his control,* then the trade in general will absolve him from responsibility of delivery, as long as he has done everything that he can in good faith to deliver in full and has not deliberately over-sold himself.
>
> "Q. And within the term 'circumstances beyond his control', state what the trade would recognize as being beyond his control?
>
> "A. *Anything that he could not, in the ex-*

> *ercise of reasonable precaution, prevent;* for instance, if I might give an instance, if a canner should fail to make delivery because he has not sufficient cans, the trade would not excuse him if he did not order the cans, or if he did not order them within a reasonable time; for instance, as happened during this past season, canners were compelled to make pro rata deliveries on certain items because the American Can Company did not deliver certain sizes of cans to them on time. The American Can Company, as a matter of fact, could not itself deliver them on time because of the railroad strike, and that prevented them being put in the cans at a certain time. If the canner had not ordered those cans, I do not believe the trade would have absolved him from the responsibility of delivery; in fact, I know they would not. But if it was beyond his control to get delivery, that would be different."

The substance of Mr. Sussman's definition is, of course, that in order to excuse the packer, the cause must have been something beyond his control. Mr. Charles H. Bently made the matter a little more definite. He said (Transcript page 198):

> "This condition in the selling contract as generally used is the outcome of the *effort to divide the hazard of crops.* The custom is for the canner to contract with the growers early in the year, not for a specific number of tons, but for a given acreage, the canner assuming a large part of the risk of the out-turn, because he has certain overhead expenses to meet regardless of the crop yield; accordingly, he goes to the trade and sells for forward delivery, and bases his sales, usually, on a conservative estimate of the yield he may expect from the acreage he has under control; and in selling on a pro rate con-

tract for delivery, after packing he asks the wholesaler to assume with him a part of the crop hazards; the grower would have no liability in the case of the utter failure of the crop, and, on the other hand, in most cases the canner would have to take whatever would be produced on that acreage; accordingly, the trade has recognized the need and the fairness of the pro rate contract, based on what is known as the short pack.

"The COURT. Now, then, if I understand that, Mr. Bentley, the term 'short pack' relates to and covers an inability to make a pack sufficient to fulfil contracts in their entirety through failure of the crop, from one cause or another.

"A. Through failure of the crop, and the contracts, as a rule, then provide for protection against other hazards in the way of natural hazards.

"Q. The question simply covers now the meaning of that term 'short pack',—what that covers; the others are, as you say, covered by other terms, strikes, and fires, etc., I suppose.

"A. Strikes, fires, floods, natural causes beyond control. Natural causes for a pro rate delivery."

We think that these two witnesses have furnished the court the true rule. On cross-examination, Mr. Bentley stated (Transcript page 206):

"Q. Well, now, Mr. Bentley, assuming that you contracted for a sufficient number of cans, and the cannery failed to deliver to you the requisite number of cans, under the short pack clause, aren't you justified in making pro rate delivery?

"A. Under any conditions beyond our control * * * if the canner fails on account of a railroad strike his contract protects him just as ours protects us.

"Q. Let us eliminate the railroad strike. Your company contracts with the American Can Company to deliver five million No. 2 cans, yet it does not do it, and you use the utmost diligence and you can produce your product, and you have not any cans to put it in, won't the trade protect you on pro rate delivery?

"A. I question very much whether we would have any right to expect the trade to protect us, unless the shortage of cans arose from conditions such as I have named, that is, a strike; the can company would certainly protect us against failure to deliver under our contract in a case of that kind.

"The COURT. In other words, if I understand you, these causes must be things that put it beyond your control? A. Precisely.

"Q. That do not grow out of any question of your own exercise of diligence and things of that kind?

"A. That is exactly the case, your Honor, the whole validity of the canner's contract providing for a pro rate delivery. It depends, as counsel said, very largely on the good faith of the canner. If there was a tendency to bring in extraneous reasons which would excuse him from making a full delivery, it would strike at the validity of the contract and make it impossible for us to deal with the trade on a pro rate contract; consequently, in trade practice and in aspects of the trade, I think I am perfectly safe in saying that the disposition has been, even among the canners themselves, to compel their people in similar lines of business to live strictly up to the terms of the contract and interpret the short pack entirely within what might be regarded as arising only from natural causes; that is to say, a short pack would only be justified where the conditions arose from natural causes.

"The point I am trying to make, your Honor, is simply, if the industry is able to continue operating along the lines of selling for fall delivery or delivery of the goods to be made hereafter, it is going to continue to divide the crop hazard risk with the grower and with the trade, he must be able at all times to justify his position with the trade and convince the body that he is acting not only in good faith, but that he is acting with reasonable care and diligence, and that he is not going to fall back on the short delivery clause of his contract for reasons unless they be extraordinary or unusual, or conditions that are absolutely beyond his control.

"Q. Now, this machinery was installed in 1916, and never, theretofore, according to the testimony of the witnesses, had been applied to that purpose before; it was a vacuum process containing a large number of tubes, 204 tubes to the pan; it develops that these tubes choked up to the extent that they had to be drilled out with electric drills, sometimes requiring an hour and sometimes days at a time. In the following year that was remedied by discovering that a larger tube would accommodate the material and not stick so easily. Assuming that the canner, with the knowledge of the purchaser, goes out to install machinery and did install the best machinery that he could find adaptable to the purpose, to his knowledge, and operated it conscientiously with his engineers, and in spite of his efforts was unable to produce more than sufficient to make a pro rate delivery. Would not those causes be taken into consideration by the trade?

"A. I should think not.

"Q. You think not. Now, do you know anything at all, Mr. Bentley, concerning the acreage which was under contract to supply the Greco Canning Co. in 1916? A. I do not.

"The COURT. He said a while ago he did not.
"Mr. MCNAB. Q. You do not know anything about the tonnage they produced? A. No."

An examination of the testimony of the witnesses Berne, Hoffman, Crary, Hume, Sussman and Chase will show that not one of them testifies directly that the term "short pack", as understood in the trade, does include a failure to deliver by reason of defective machinery or experimental machinery, which fails to work in spite of everything the packer does to make it work. We think the court was justified in concluding from the evidence that the term "short pack" was never intended to cover the failure of machinery,—experimental or otherwise,—and that the real reason for its adoption was, as Mr. Bentley said, the outcome of an effort to divide the *hazard of crops.* This is a reasonable and sensible construction of the term, and it is supported by the evidence.

CAUSE BEYOND CONTROL.

If failure of machinery is not included within the meaning of the term "short pack", then the question we have to decide is, whether or not the failure of machinery, under the circumstances of this case, was a cause beyond the control of the plaintiff in error. We believe that this question is settled by the authorities.

In

Carnegie Steel Co. v. United States, 240 U. S. 156; 60 Law Ed. 576,

the steel company agreed to make certain eighteen inch armor plates for ballistic tests. The steel company did not know the proper formula for hardening these plates, and were forced to experiment, with the result that there was a considerable delay in delivery. In making tests to determine the proper formula, the steel company used all due diligence and dispatch. The court said, at page 164 (579 Law Ed.):

> "It will be observed that the point in the case is a short one. It is whether the causes of delay alleged in the petition were unavoidable, or were of the character described in the contract; that is, 'such as fires, storms, labor strikes, action of the United States, etc.' The contention that the alleged causes can be assigned to such category creates some surprise. *It would seem that the very essence of the promise of a contract to deliver articles is ability to procure or make them.* But claimant says its ignorance was not peculiar, that it was shared by the world, and no one knew that the process adequate to produce 14-inch armor plate would not produce 18-inch armor plate. Yet claimant shows that its own experiments demonstrated the inadequacy of the accepted formula. *A successful process was therefore foreseeable and discoverable.* And it would seem to have been an obvious prudence to have preceded manufacture, if not engagement, by experiment rather than risk failure and delay and their consequent penalties by extending an old formula to a new condition."

Again, on page 165 (579 Law Ed.), the court said:

> "It was said, however, in The Harriman, that 'the answer to the objection of hardship in all such cases is that it might have been guarded

> against by a proper stipulation', and such a stipulation is relied on in the case at bar. Ignorance of the scientific process necessary for face-hardening 18-inch armor plate is asserted to be an unavoidable cause of the character of the enumeration of article 8 of the contract; that is, such as fires, storms, labor strikes, action of the United States, etc.' The contention is that it is the same 'genus or kind', because (1) it was not foreseeable when the contract was made; (2) was not the result of any act or neglect on the part of the claimant; (3) was not a cause the company could prevent. What we have already said answers these contentions. Ability to perform a contract is of its very essence. It would have no sense or incentive, no assurance of fulfilment, otherwise; and a delay resulting from the absence of such ability is not of the same kind enumerated in the contract—is not a cause extraneous to it and independent of the engagements and exertions of the parties."

This decision seems to fit our case. The defendant in this case did find out what was the matter with the machinery, and remedied it by putting in bigger tubes. To use the language of the Supreme Court,—"a successful process was, therefore, foreseeable and discoverable", and the defendant in this case ought "to have preceded manufacture, if not engagement, by experiment, rather than risk failure and delay."

In

Morgan v. Lyall, 16 Quebec King's Bench (1907), page 562,

the court said at page 568:

> "The learned judge in the Superior Court found that the damage sustained by Lyall for nondelivery was twenty cents a barrel, and we

see no reason for differing from that estimate, and therefore we are of opinion that twenty cents a barrel should be allowed on this deficit of 10,468 barrels. The learned judge in the court below upheld the plea of Morgan that he had been prevented from manufacturing this quantity by *force majeure*. This court is not able to concur in that view. We find no *force majeure* in the case. The clause of the contract does little more than recognize the principle of our code and of the common law, as regards exemption for *force majeure*. Here is what the contract itself says: 'It is understood that the party of the first part shall not be held liable for damages if, at any time, by failure in supply of electric power, the occurrence of a strike, or other cause beyond his control, it becomes impossible to fulfil the contract.' Now, the test of *force majeure* is not the inconvenience of carrying out the contract; it is not the increased cost of carrying out the contract, but the impossibility of carrying out the contract; and that is all that we find Morgan stipulated for: the impossibility of carrying out the contract, being prevented by some cause beyond his control, and that this only expresses the common law principle, with the addition of the occurrence of a strike, which would not be *force majeure* had it not been stipulated.

"We have therefore to decide whether in reality Morgan was prevented by *force majeure;* that is to say, that it was impossible for him to carry out this contract. Well, we find as regards manufacturing with this electric power, that the impossibility arose from his own defective dynamos, from his own defective electric apparatus, and not from any want of supply of electric power. We think when the contract says that he shall not be responsible if prevented by failure in supply of electric power; we think that that does not apply to his own dynamos. Who

supplied him with electric power? It was probably the Montreal Light, Heat and Power Company that controls the electricity here. It was they that supplied him, and in the contract what is meant by supplying electric power? It refers to the person who supplies him with that power. It certainly does not refer to a defect in his own machinery or apparatus. We therefore think that Morgan cannot plead the defect in his own dynamo. He might have had all the supply of electric power he wanted, if it had not been for his own defective machinery."

In

Connorsville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123; 76 N. E. 294,

we find the following in the syllabus:

"In an action for breach of contract to furnish wheels, an answer presenting a defense on a provision making 'unavoidable cause' an excuse for failure to perform is not sufficient to bar the action, where it alleges that the failure was caused by the giving way of the foundation of the engine, the delay of plaintiff in giving orders, and the extraordinary demand for material necessary to manufacture the wheels, all of which, without fault of defendant, and that defendant in good faith complied with the contract, except in as far as it was prevented from doing so by such unavoidable causes."

In

Pacific Sheet Metal Works v. California Canneries Co., 164 Fed. 980,

the term "unavoidable casualty" was held not to include the non-arrival of a cargo of tin, due to adverse weather. The court said, at page 984:

"3. The finding that plaintiff in error shipped a large quantity of tin upon the ship Ancois, and that such ship was delayed in reaching San Francisco on account of the storms and winds encountered by her on the voyage from Liverpool, does not constitute a defense to the action. Such finding is not sufficient to show that the plaintiff in error was prevented from the performance of its contract by reason of 'damage by the elements, or any unavoidable casualty'. If the contract had contained an express or implied stipulation that the cans plaintiff in error agreed to deliver were to be manufactured from the tin then laden on the Ancois and to be by her brought from Liverpool to San Francisco, around Cape Horn, the question would be different from the one now before us. Anderson v. May, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642; Stewart v. Stone, 127 N. Y. 502, 28 N. E. 595, 14 L. R. A. 215. But there was no such express stipulation, and there is nothing in the nature of the contract itself, when considered in connection with the surrounding circumstances and situation of the parties, to authorize the court to construe it as containing such an implied condition or stipulation. The contract was an absolute one upon the part of the plaintiff in error to deliver the cans referred to in the contract, unless prevented from so doing by an unavoidable casualty or by reason of damage from the elements. If the plaintiff in error did not have on hand a sufficient quantity of tin for the manufacture of the cans contracted for, it was free to adopt any course to procure the tin needed to carry out the contract, which its judgment might suggest. It was not restricted to shipping the same around Cape Horn, on the Ancois. It had the right under its contract to import the tin into New York and then bring the same by rail to San Francisco, and it cannot be excused from per-

formance by reason of the facts that it chose to rely upon the ability of the Ancois to make the voyage around Cape Horn within such time as would permit it to fulfill its contract, rather than to have the tin brought from New York by rail, and that the vessel was delayed by storms and winds beyond the time usually consumed on such a voyage."

In

American Bridge Co. v. Glenmore Distilleries Co., 107 S. W. 279 (1908, Ky.),

there was a contract to construct a steel tower, but the contractor was not to be "responsible for delays in transportation, strikes, fires, floods, storms, nor any other circumstance beyond its reasonable control". The court said, at page 283:

"Nor do we think that the inability of the plaintiff to get the material with which to construct the tower from the rolling mills, with which it was connected, in sufficient time to complete its contract with appellee within the 45 working days from September 12, 1901, was a cause beyond its reasonable control within the meaning of the contract under discussion. The provision as a whole is as follows: 'And it is further understood that the party of the first part (appellant) shall not be held responsible for delays in transportation, strikes, fires, floods, storms, nor for any other circumstances beyond its reasonable control. Under the familiar rule of ejusdem generis, the general language following the specific enunciation of the causes which prevented the appellant from being responsible for nonperformance of its contract within the stipulated time must be limited to include causes similar to those specifically set out; and, under this rule, we think it clear that

> the failure of the appellant to provide material with which to carry into effect its contract was not a circumstance beyond its reasonable control. None of the specified causes for nonresponsibility could possibly be controlled by any foresight on the part of the appellant; but foresight would undoubtedly suggest, before making a contract so urgent in its nature as the one before us, that the material with which it was to be carried into effect should have been secured in advance, at least, foresight and diligence would have secured the material in advance, and therefore the failure to exercise these cannot be said to be a cause for nonfulfillment beyond the reasonable control of the appellant."

In

New York Coal Co. v. New Pittsburgh Coal Co., 99 N. E. 198 (1912, Ohio),

there was a lease of a coal mine which provided that the lessee should take the coal from the mine and pay to the lessor a certain minimum royalty. It further provided:

> "It is hereby understood and agreed by and between the parties hereto, that in case and so long as it shall be impossible to mine and remove said amount by reason of strikes, lockouts, fires, floods, or any other cause beyond the control of the second party, lack of transportation facilities excepted, the said minimum shall not apply."

The causes relied upon by the defendant were, the objection and refusal of the miners to work in a certain part of the mine, and the inability of the defendant to mine coal from that part of the mine, because of its physical condition. The court refused

to allow the introduction of any of this evidence, on the ground that it did not tend to prove any cause beyond the control of the defendant, saying at page 206:

> "This brings us to a consideration of that clause, and of the meaning of the phrase 'or any other cause beyond the control of the second party', as therein used. We have already indicated the contention of defendant that this clause should not be limited to temporary causes or those similar to the ones specifically mentioned by the rules *noscitur a sociis* and *ejusdem generis,* but that it includes a condition of affairs such as defendant claims to have existed and to now exist. The clause itself, however, clearly shows that temporary conditions only were in the minds of the parties, as indicated by the use of the words 'in case and so long as it shall be impossible to mine and remove', etc. Then follow certain specified causes which shall suspend the operation of the minimum royalty, viz., strikes, lockouts, fires, and floods, none of which can be fairly said to have been considered by the parties as permanent obstacles to the operation of the mine. This would seem to be emphasized by the exception to 'other causes beyond the control of the second party', viz., 'lack of transportation facilities', which would not relieve the lessee, and could hardly have been considered by the parties as a matter of permanent disability. The rule ejusdem generis is a well-known rule of construction, and has been frequently recognized and applied in this state and elsewhere. While not conclusive under all circumstances, nor applied when it would violate the clear intention of parties as expressed in their written agreements, nevertheless it is of value whenever there would be no such violation, and this is a case where the rule seems to be plainly applicable.

"Furthermore, the conditions which the parties evidently had in mind that would excuse the lessee from the payment of the minimum royalty were undoubtedly such as might arise in the future, and render it impossible for him to carry out his agreement. The very nature and character of those enumerated would seem to make that plain and negative the idea that the physical condition or geological formation of the property, which was necessarily in existence at the date of the lease and would, of course, be permanent, was also to be included among these temporary suspensions of the lessee's liability."

In

Simpson Bros. Corporation v. John R. White & Son, Inc., 187 Fed. 418,

the court had under consideration the meaning of the term "causes beyond the control of the contractor". Commenting upon inability to get material as one of these causes, the court said, at page 424:

"The mere failure to get material from one materialman cannot be regarded as a cause of delay beyond the control of the contractor, unless the material be proved to be of such peculiar character that it is not otherwise procurable. The failure of a business arrangement made between the contractor and those who supply him with materials, or the failure of prompt delivery of materials ordered from a distance by carrier, is an ordinary business contingency to be provided for by the contractor, and the risk of delay from causes of this character cannot be thrown upon the owner under a clause of this kind by evidence of the mere occurrence of the fact, without additional evi-

> dence showing that the contractor was practically limited to a definite source of supply, and that he could not be expected under the requirement of reasonable diligence to procure his material elsewhere."

In

Vredenburgh v. Baton Rouge Sugar Co., 28 So. 122 (1899, La.),

a planter agreed to furnish cane to a company engaged in grinding the same and manufacturing sugar therefrom. The contract authorized the company to stop receiving cane in certain cases, and provided for the discontinuance of operations, in the event of its machinery becoming permanently disabled, "in consequence of fire, want of water, breakdown, labor strikes, or any other cause beyond its control". The court held that where the discontinuance of operations was attributable to the ignorance, mismanagement or incompetence of the representatives of the company with respect to the construction and operation of the sugar-making plant, the clause would not excuse. The court said, at page 129:

> "The trouble arising from the lack of skill and experience is made manifest from the admission of the defendant's representative, in various letters written by him and in his evidence on the trial, from which it appears that there was, from the beginning, miscalculation, or no calculation, as to the quantity of cane which could be consumed in the daily operation of the mill, and as to the handling of the loaded cars, so that the factory was chronically in a state of congestion, a large proportion of the cane turned sour before it was ground, and both

time and money were lost in the attempt to make sugar from the sour cane. In this connection it is significant that, while for the season in question the defendant had contracted for 16,000 tons of cane, it contracted the next year for a much smaller quantity, and ground only about 3,500 tons, although it claims to have improved its plant in the meanwhile.

"Our conclusion, therefore, after a re-examination of this case, is that the defendant failed from the beginning to comply with its contract, not so much by reason of any of the conditions provided for therein, as because of the ignorance and lack of experience of its representatives; and that its discontinued operations before the close of the season, not because of the settling of the building, but because, having no skilled head in charge, and the capacity of the plant having been overrated, it found that it was not only inflicting loss upon others, but was losing money itself."

We do not mean by this citation to intimate that the Greco Company's officers and employees were incompetent, but their own testimony shows that they were ignorant of the construction and operation of vacuum pan machinery. It took them the whole season of 1916 to find out what was the matter with their paste line. Ordinary prudence, as the United States Supreme Court intimated in the *Carnegie Steel Case,* ought to have suggested to them the importance of experimenting before selling the product to be made by the vacuum pans.

It is not an unreasonable thing to require of a man who agrees to manufacture a certain article, that he put himself in a position to do so by first

getting the necessary knowledge and making the necessary experiments to know what he is about. There could be no security whatever for the purchaser of manufactured goods if the manufacturer is to be excused because his machinery won't work. "It would seem that the very essence of the promise of a contract to deliver articles is ability to procure or make them." It seems obvious that defendant's machinery trouble was not a cause beyond its control. The defendant could have designed this machinery and experimented with it and found out what was the matter with it and remedied the fault before agreeing to make and deliver Salsa de Pomidoro. He did not do this, and he should not now be allowed to shift the loss resulting from his experiment from his own shoulders, where it belongs, to the shoulders of his purchasers.

PRACTICAL CONSTRUCTION OF THE AGREEMENT.

Counsel for plaintiff in error insist that the parties themselves acted upon and placed a practical construction upon the language of their agreement, and cite authorities to the effect that where parties to a contract have so construed and interpreted it the courts generally adopt that construction in arriving at the medium of the contract.

The true rule is stated in *Sternbergh v. Brock,* 225 Pa. 279, at 287; 74 Atl. 166. It is as follows:

> "It ought to appear with reasonable certainty that they were acts of both parties done with

> knowledge and in view of a purpose at least consistent with that to which they are now sought to be applied."

The first time Mr. Greco notified Pastene & Co. that he was not going to be able to make more than a 25% delivery was on October 12, 1916. In that letter (Transcript page 42) Mr. Greco not only said that he was having trouble with his machinery, but added:

> "For your information we may also add that the crop this year is very short, as we have had considerable rain, which has caused much damage."

Everything that Pastene & Co. said in their letters is to be interpreted in the light of the fact that they had constantly in mind Mr. Greco's claim that there was a short tomato crop. They were, of course, willing to do the decent thing. In their letter of October 25, 1916 (Transcript page 45) they say:

> "At this time we will only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally of course, that in any case we shall expect a full pro rata delivery of all such goods as you are successful in producing."

It does not seem to us that Messrs. Pastene & Co. could be penalized because they stood ready to meet Mr. Greco half way and did not immediately begin to insist upon their legal rights under the contract. They had in mind that Greco had two difficulties to

contend with, namely, bad machinery and short crop. This is clearly shown by their letter of November 7, 1916 (Transcript page 48):

"Boston, November 7th, 1916.

"The Greco Canning Co.,
San Jose, California.

Gentlemen:

Confirming ours of the 30th ultimo.

Samples: The duplicates which you have sent to us by express came to hand a day or two ago, and upon examination we find that in fact, as you previously advised, the concentration is not all that it should be. However, considering the unfortunate circumstances which you have encountered, as explained to us in your recent favors, we have no complaint to offer, and providing the delivery you make to us is equal to the sample received, we shall consider the delivery a good one.

Shipment: We had rather hoped to have received definite advice that shipment which your telegram of October 26th advised would probably go forward in a day or two, was not actually on the way. We certainly trust that there will be no particular delay in the forwarding of this lot and that we may hear from you now any day that the goods are in transit:

Pro rata: We understand that weather conditions have greatly improved during the last ten days in your country and that a long packing season is anticipated. We surely trust that these predictions may not miscarry, as in that case we are confident you will find it possible to considerably increase the production which you previously estimated as possible. As previously written you, we certainly have no intention of being unreasonable or expecting from you that which it is physically impossible for you to accomplish, but we do expect, of course, that you will spare no efforts to, as nearly as

possible, fill your contracts, and it is for this reason that knowing that conditions have materially improved since you previously wrote us on the subject, we look forward to a better delivery than previously predicted. Knowing that you will not spare any reasonable efforts to attain the desired result, we look forward in anticipation to your more favorable news as mentioned.

Yours respectfully,
P. Pastene & Co., Inc. P. R. Pastene."

In other words, *they believed that there was really a short crop of tomatoes, and everything they wrote to the Greco Canning Company was written with that in mind.*

Before the court can say that an act done or a thing said amounts to a construction placed upon a contract by a party thereto, it must appear that the act done or the thing said was "done with knowledge". At the time of the correspondence, that is to say, during the season of 1916, Pastene & Co. did not know what the evidence in this case has disclosed in regard to the tomato crop, and it did not know what the evidence has entirely failed to disclose in regard to the *relation between the acreage contracted for by the defendant and the amount of tomato products Greco sold against that acreage.* It seems plain to us that nothing found in the letters of Messrs. Pastene & Co. amounts to a construction placed upon the contract. They simply showed a disposition not to take advantage of the defendant's misfortune. They probably changed their minds after an unsuccessful attempt to adjust the matter.

Counsel strenuously contend that the contract was for a product of the Greco Company's cannery. This was admitted from the start. We have never made any claim that Mr. Greco ought to have gone into the market and bought the canned salsa. What we do contend is that he should have tried to get *tomatoes* elsewhere. Mr. Greco testified that he found out that his acreage was insufficient, due to rain and frost, right at the beginning. He tried to get tomatoes only in Santa Clara Valley, at Manteca and at San Francisco. He could not name a farmer who had been approached at Manteca. At San Francisco he simply went into the commission district, but made no arrangement with any dealer (Transcript page 86).

We believe that the testimony in this case, including that of Mr. Leal Davis, Mr. Greco's engineer, shows conclusively that the paste line was never stopped for lack of tomatoes, but that Mr. Greco's whole trouble was with the machinery. The case of *Carnegie Steel Co. v. United States,* 240 U. S. 156; 60 L. Ed. 576, completely disposes of this branch of the case.

On page 18 of their brief counsel for plaintiff in error attempt to distinguish this case on the ground that the difficulties there were unforeseen and that in our case the difficulties were foreseen. One of the points made by the Supreme Court in that case was the following:

> "A successful process was therefore foreseeable and discoverable."

If Mr. Greco wanted Mr. Pastene to share with him the risk of his machinery experiment, why did Mr. Greco say when he was trying to get an order from Mr. Pastene that he knew all about making the salsa. His words were (Transcript page 43):

> "As we are Italians and know what the Italian people must have and being very familiar with the method of manufacturing this article you can rest assured that it will be the equal of that imported from Italy."

It seems perfectly clear that Mr. Greco represented that he knew about the machinery and that he was willing to take the chance of its success. Without making any experiment with the machinery he contracted to deliver its product. After the experiment he found out what was wrong with the machinery, remedied it, and since then has had no trouble. He now asks the court to make his purchaser stand the cost of his experiment.

He says that there was a short crop of tomatoes, but he failed to tell the court how many tomatoes he had contracted to sell. He expected to get 5,500 tons of tomatoes. He might have sold 20,000 tons and thus created his own shortage by overselling his acreage. But he did not, or would not, tell *how many tons he had contracted to sell.*

The difference between the contract price and the market price at the time and place of delivery was seven thousand two hundred fifteen & 15/100 dollars ($7,215.15). The trial court allowed plaintiff in error a 20% abatement. This was not correct, be-

cause Mr. Greco did not furnish figures to show the relation between the acreage he contracted for and the amount of tomatoes he had contracted to sell. The contention of plaintiff in error should be answered by increasing the judgment to seven thousand two hundred fifteen & 15/100 dollars ($7,215.15) and affirming it as modified.

Dated, San Francisco,
October 17, 1921.

Respectfully submitted,

WILLIAM THOMAS,
LOUIS S. BEEDY,
JAMES LANAGAN,
THOMAS, BEEDY & LANAGAN,
Attorneys for Defendant in Error.